

**Department of Justice (Canada)****Ministère de la Justice (Canada)**Prairie Region, Saskatoon Office
10th Floor
123 - 2nd Avenue South
Saskatoon, SK S7K 7E6Région des Prairies, Bureau de Saskatoon
10^e étage
123 - 2^e Avenue sud
Saskatoon, SK S7K 7E6Security Classification : **Protected B**Telephone: (306) 975-5992
Facsimile: (306) 975-6240
Internet:Our file: 2-32417
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VIA FACSIMILE

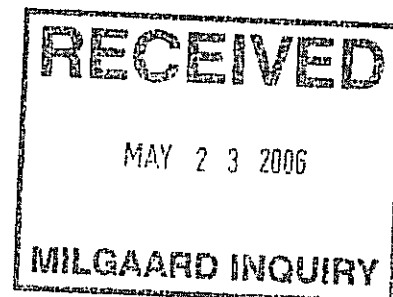
Commission of Inquiry into the Wrongful Conviction of David Milgaard
1020 - 606 Spadina Crescent East
Saskatoon, SK S7K 3H1**Attention: Douglas C. Hodson**
Commission Counsel**Re: Submissions on behalf of the Federal Minister of Justice regarding the
Constitutional Limitations on the Saskatchewan Inquiry into the Wrongful
Conviction of David Milgaard**

Please find attached our submission with respect to the above-referenced matter.

This letter shall provide our written consent to the Commission for the distribution of the attached submission to the parties with standing at the Inquiry.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Jennifer L. Cox
Counsel
Civil Litigation and Advisory ServicesJLC:ttd
attachment

**SUBMISSIONS ON BEHALF OF THE FEDERAL MINISTER OF JUSTICE
REGARDING THE CONSTITUTIONAL LIMITATIONS ON THE
SASKATCHEWAN INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID
MILGAARD.**

As this Commission of Inquiry stated at the outset of these proceedings, there are constitutional limits which must be observed by a Provincial Commission of Inquiry when it comes to matters which touch upon the Federal Government.

The Federal Minister of Justice has approached this Provincial Inquiry with a spirit of cooperation: the Minister has sought standing and participates full time at this Inquiry, broad access has been provided to documents, counsel have refrained from objecting from time to time and the Minister has voluntarily proposed that two "federal witnesses" participate.

The material put forward by Commission counsel on May 18th, 2006, contained a proposed outline of areas to be covered with Federal witnesses. This outline suggests areas which may go beyond any reasonable construction of the Commission's mandate and thus it will be imperative to have the constitutional matters clarified before any federal witnesses testify.

At the present time, the two proposed Federal witnesses include Mr. Eugene Williams, Q.C. and Mr. Ronald Fainstein, Q. C. Mr. Williams performed the investigative work in response to Mr. Milgaard's applications for mercy which resulted in many witness statements being taken. Mr. Fainstein was counsel for the Minister of Justice at the Supreme Court reference and was also primarily responsible for pursuing the DNA testing after the s.690 process was over which ultimately led to the exoneration of Mr. Milgaard. To the extent that the facts gathered by these individuals and their testimony will assist the Commission with its work, the Attorney General does not object to their being called, within the appropriate constitutional boundaries.

In addition, the Minister has already asserted a claim of privilege on some of the areas outlined by Commission counsel. As Commission counsel has already indicated, any outstanding issues with privilege will be dealt with after the constitutional matters have been decided.

I. THE CONSTITUTIONAL LIMITS OF A PROVINCIAL COMMISSION OF INQUIRY.

The legal authority to limit the scope of Inquiry into a Federal entity, such as the Department of Justice, is the Supreme Court of Canada's decision in Quebec (Attorney General) and Keable v. Canada (Attorney General), [1979] 1 S.C.R. 218.

As Commission counsel has already pointed out, the limits of a Provincial Commission of inquiry as stated in Keable are;

"A Provincial commission of Inquiry can not inquire into the policies, procedures, rules, administration or management of a Federal institution or entity"

As the Federal Department of Justice is a Federal institution to which the rules of Keable will apply, there will be constitutional limits upon the areas into which this Provincial Commission of Inquiry can venture.

Commission counsel has used the terms "gather", "assess" and "analyze" a number of times to describe the Federal Government's role in dealing with Mr. Milgaard's s.690 applications. The Minister respectfully submits that the appropriate distinction to be made is between which activities were investigative or fact finding in nature and those which constituted advice, legal or otherwise.

The Minister respectfully submits that those communications which are more appropriately characterized as advice, either written or oral, are at the very core of that which is proscribed by the Supreme Court of Canada's decision in Keable.

II. THE OUTLINE OF AREAS TO BE COVERED IN EXAMINATION OF FEDERAL JUSTICE WITNESSES

Referring to the Commission's outline of areas to be covered in examination of Federal Justice witnesses, the Minister submits that some of the questions or documents are, in whole or in part, beyond the scope of this Inquiry. The areas which concern the Minister are outlined below and where there is only a partial concern with the line of questioning, the specific concern is detailed in brackets.

4(a) Justice Canada's initial review and analysis of the application and the supporting materials. (The review and analysis of the facts by the investigator would be permissible lines of questioning to the extent that it involves fact gathering. If any of the review or analysis is characterized as legal advice or

advice to others within the Department from the investigator, it would be beyond the scope of this Inquiry)

4(b) Review communication between the Minister/Justice Canada and David Milgaard, his counsel and Joyce Milgaard during the course of the investigation, including the meeting of October 1, 1990. (If anything in this area would include internal discussions about any of these matters, the line of questioning would take the matter outside the bounds of the Inquiry)

4. (e)(ii) the witness interview/examination process including the determination of who was interviewed and why, who was not interviewed and why not, as well as the manner of interview/examination chosen for each witness. (The investigator can speak to why he interviewed those people he did and the type of examination he chose for each person but he can not be asked about what the practices or policies within the Department are with respect to these questions)

4. (e)(v) discussions between Justice Canada lawyers relating to the investigation of the application.

4. (f) Review the investigation reports Review the process which led to the Minister's decision on February 28, 1991, including:

- (i) Review the investigation report(s) provided by Justice Canada to the Minister, including discussions and communication between Justice Canada lawyers in the course of preparation and review of the report(s);**
- (ii) Review the advice provided to the Minister by Justice Canada lawyers;**
- (iii) Review the advice provided to the Minister by third parties (i.e. Mr. Justice McIntyre);**
- (iv) Elaborate on the decision made by the Minister to dismiss the application and the supporting reasons. (ok)**

6. (e) Review the investigation conducted by Justice Canada, including the following:

- (v) discussions between Justice Canada lawyers relating to the investigation of the application.**

6. (f) Review the process which led to the Minister's decision of November 27, 1991, including:

- (i) Review the investigation report(s) provided by Justice Canada to the Minister, including discussions and communication amongst and between Justice Canada lawyers in the preparation and review of the report(s);**
- (ii) Review the advice provided to the Minister by Justice Canada lawyers;**

- (iii) Review the advice provided to the Minister by third parties (i.e. Mr. Justice McIntyre);
- (iv) Elaborate on the decision made by the Minister to refer the matter to the Supreme Court of Canada.
- (v) Review steps taken by the Minister/Justice Canada following the Reference decision.

9. (a) The Minister's decision to set aside the conviction of David Milgaard, following the Reference decision;

- (c) The role of Justice Canada officials in arranging for DNA testing of Gail Miller's clothing (This is a very general statement and without further details, it is difficult to determine what the Constitutional limitations are).

III. THE PERMISSIBLE AREAS OF INQUIRY

The Minister concedes that a Provincial Inquiry can inquire into those aspects of the handling of the s.690 applications filed by Mr. Milgaard, subject to the constitutional limitations, based on the Supreme Court's decision in McKeigan v. Hickman, [1989] 2 S.C.R. 796.

However, the mandate of this Commission is only concerned with the s. 690 process as it existed at the time of Mr. Milgaard's applications. The Commission should be conscious of not only the constitutional limitations on its mandate in this regard, but the practical reality that the mercy process is much different now than it was at the time of Mr. Milgaard's applications. The relevant Criminal Code provisions have been significantly amended and the administration of mercy applications has been altered.

IV. CONCLUSION

The Minister has agreed to fully participate in this Inquiry as demonstrated by having sought standing, the disclosure of numerous documents and the voluntary participation of witnesses.

As this is a Provincial Commission of Inquiry, the parameters of such must respect constitutional limitations.

The Minister respectfully requests a ruling on the general scope of the constitutional boundaries of this commission of Inquiry along with a ruling on the specific areas as identified in part II of this submission to facilitate the Minister's cooperation with the Inquiry. These matters should be dealt with prior to any Federal witnesses giving evidence so that there is a common understanding of the appropriate focus of questioning.



Department of Justice (Canada)
Prairie Region, Saskatoon Office

Ministère de la Justice (Canada)
Région des Prairies, Bureau de Saskatoon

FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom: Douglas C. Hodson		Name / Nom: Jennifer L. Cox Contact: Tenley Desroches (306) 975-5864	
Address / Adresse: Commission of Inquiry into the Wrongful Conviction of David Milgaard 1020 - 606 Spadina Crescent East Saskatoon, Saskatchewan S7K 3H1		Address / Adresse: Department of Justice (Canada) Prairie Region, Saskatoon Office 10th Floor 123 2nd Avenue South Saskatoon, Saskatchewan S7K 7E6	
Fax # / No du télécopieur: (306) 933-8305	Tel. No. / No du Tél: (306) 933-8306	Fax # / No du télécopieur: (306) 975-6240	Tel. No. / No du Tél: (306) 975-5992
Comments / Commentaires: Please see attached. Milgaard Inquiry 2-32417/			
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